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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-891

FLORA PURIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 3-15) is reported at 486 F.2d 1363.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1973. The petition for a writ of certiorari was filed on December 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether physical evidence and post-arrest statements by petitioner were improperly admitted in the government's case on rebuttal.
2. Whether the court's instructions to the jury were proper.
3. Whether the court improperly denied petitioner the opportunity to examine documents produced pursuant to a subpoena *duces tecum*.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of possession and distribution of cocaine.[1] She was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. 3-15).

The facts are fully set forth in the opinion of the court of appeals, and may be summarized as follows. In August 1971, New York City Police officer Michael Bergin and his partner, Agent Perrigo of the Federal Bureau of Narcotics and Dangerous Drugs, visited co-defendant Da Silva and asked him for cocaine. Da Silva made some telephone calls and told the agents to return the following week. When they did

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[1] She was acquitted on a conspiracy count. A co-defendant, Ernani Da Silva (petition for a writ of certiorari pending, No. 73-5948), was convicted of the conspiracy. A third defendant, Paulo Romero, pleaded guilty to two substantive counts of the indictment.

so, Da Silva introduced the agents to co-defendant Romero, who agreed on September 9, 1971, to supply an ounce of cocaine for $800. Romero took the agents to an apartment building hallway and introduced them to petitioner, who produced the cocaine.

On September 15, 1971, the agents returned to the building and went to petitioner's apartment, where Perrigo asked for more cocaine. Petitioner stated that she had none but suggested that he call again. On the following day, Romero sold another ounce of cocaine to Bergin and Perrigo for $900. The quantity was determined to be short, however, and Romero went to petitioner's address, returning with the balance of the drugs.

On September 23, 1971, Romero offered to obtain eight ounces of cocaine at $900 per ounce from the "same girl" who had supplied them previously. The agents met petitioner at Romero's apartment, where petitioner gave them the eight ounces of cocaine. Bergin left the apartment on the pretext of getting the purchase money from his car and returned with other officers, who arrested petitioner and Romero (Pet. 5-8).

ARGUMENT

1. Petitioner contends that the court erred in admitting in the government's rebuttal case physical evidence found on petitioner's person at the time of her arrest, and a spontaneous statement made following her arrest, before she was advised of her rights.

a. As part of its case in chief, the government proposed to introduce the testimony of a policewoman who searched petitioner at the time of her arrest and discovered a packet of cocaine concealed in her brassiere. The evidence was offered to prove petitioner's "knowledge" of the offense (Tr. 287-288). The court ruled that, since the indictment did not charge possession of the cocaine found in that search, its use in the prosecution's case in chief might be prejudicial. However, the court stated that petitioner could be questioned about the cocaine on cross-examination and that the evidence could be admitted in rebuttal, "depending on what course the defendants' case takes * * *" (Tr. 289-290).

On direct examination, petitioner denied any knowing involvement in Romero's cocaine transactions with the government agents. She claimed that she had not delivered cocaine to the agents on September 9, but that she had merely returned to Romero on that date a "package" which Romero had forced her to keep for him by threatening to tell petitioner's husband that she and Romero were having an affair and had used drugs together (Tr. 311-314). She asserted that she had attempted to end her association with Romero, that she had not seen him at all between September 9 and September 23, and that she had gone to his apartment on the latter date solely to pick up her guitar, which she needed for a recording session (Tr. 315, 321).

By implying that she had used cocaine with Romero (see Tr. 320), while denying that drugs were con-

nected with the purpose of her visit to Romero's apartment on September 23, petitioner opened the door to cross-examination on this subject. Accordingly, the prosecutor elicited petitioner's statement that, although she had used drugs after meeting Romero, she had stopped doing so prior to September 23 (Tr. 336). On redirect examination, petitioner claimed again that she had not seen Romero between September 9 and 23 and that she met him on the latter occasion only to pick up her guitar (Tr. 338-341).

The district court concluded that this testimony made admissible prosecution evidence that petitioner was carrying a small quantity of cocaine on her person at the time of her arrest on September 23. Accordingly, it admitted the evidence in rebuttal notwithstanding a defense objection that notice and a suppression hearing were required (Tr. 349-353). After the policewoman testified concerning the search of petitioner, the court instructed the jury at length that the evidence could not be considered on the issue of guilt, but that it was admitted solely as evidence affecting the defendant's credibility (Tr. 447-449). Petitioner requested no amplification of the instruction (Tr. 450), which was repeated in substance in the court's final charge to the jury (Tr. 536-538).

In surrebuttal, petitioner claimed that she had never seen the packet of cocaine until it was introduced in evidence, but that she had seen the policewoman pick up something from the floor when she was searched. She denied having had the cocaine or

anything else concealed upon her person at the time of her arrest (Tr. 453).

Relying on *Agnello* v. *United States*, 269 U.S. 20, petitioner asserts that the cocaine was improperly admitted in rebuttal. *Agnello*, however, involved a search the illegality of which was demonstrable from uncontroverted facts and the existence of which was evidently unknown to the defendant before trial (*id.* at 34-35). The Court held that in those circumstances the evidence could be excluded on rebuttal although the defendant had failed to move for suppression prior to trial.

Agnello was distinguished on its facts in *Walder* v. *United States*, 347 U.S. 62, 66, where previously suppressed, illegally obtained evidence was admitted to impeach the credibility of a defendant who had claimed never to have been involved with narcotics. The Court noted that the defendant's testimony had gone beyond a denial of complicity in the crimes charged; it stated that, while a defendant is guaranteed the right to meet the charges against him, he is not licensed to make false statements regarding collateral matters. *Id.* at 65. This doctrine was reaffirmed recently in *Harris* v. *New York*, 401 U.S. 222, where *Walder* was cited with approval. See also *United States* v. *Curry*, 358 F.2d 904, 911 (C.A. 2), certiorari denied, 385 U.S. 873. The *Harris* and *Walder* principles govern here.

The cocaine found on petitioner's person was relevant to the issue being tried. Petitioner's defense was that her presence at the scene of the September 23

cocaine sale was inadvertent; that she had gone to Romero's apartment for an innocent purpose and was unaware that a drug transaction was to take place; and that her connection with drugs had ended earlier when she ceased seeing Romero. The evidence that she was carrying cocaine at the time of her arrest was relevant to refute this defense, and the prosecution was properly permitted to use the evidence to impeach petitioner's credibility. "[T]he prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." *Harris* v. *New York*, *supra*, 401 U.S. at 225.

Indeed, in the instant case, unlike *Agnello* and *Walder*, the challenged evidence was legally obtained. Petitioner was lawfully arrested in the course of the commission of a crime, and the search of her person was conducted incident to that arrest.[2] See *United States* v. *Robinson*, No. 72-936, decided December 11, 1973.

b. Petitioner also contends (Pet. 85-93) that certain statements which she made to police officers at the time of her arrest were admitted in rebuttal in violation of the standards of *Miranda* v. *Arizona*, 384 U.S. 436, and *Brady* v. *Maryland*, 373 U.S. 83.

As noted above, petitioner opened the subject of her drug usage on direct examination (Tr. 311-314,

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[2] Under petitioner's version of the facts, in which the cocaine was picked up by a policewoman from the floor, there would be no basis for concluding that there had been an illegal search and, in any event, petitioner would be without standing to object.

320). Thereafter, on cross-examination, the prosecutor elicited petitioner's admission that she had used cocaine during her association with Romero (Tr. 336). Petitioner was then asked whether she had spoken to anyone at the time of her arrest and denied having done so (Tr. 343). Specifically, she denied having told the police that she had never used cocaine and that the undercover agents had brought the cocaine to Romero's apartment (Tr. 344). On rebuttal, the arresting officer was permitted to testify over objection that, when petitioner was arrested, she stated: "It's the two guys that just left that brought the cocaine to the apartment," adding "I swear to God, I never saw cocaine in my life." The officer testified that the statement was spontaneously made before petitioner had been advised of her rights (Tr. 404-405).

Petitioner apparently contends that *Brady* requires the suppression of any testimony concerning statements exculpatory in form, if information regarding such statements has not been provided to the defense before trial, even if the statements were made orally by the defendant herself. Petitioner notes (Pet. 89) that she denied making the statements in question. Thus, on her own version of the evidence, the statements cannot be considered exculpatory and petitioner of course had knowledge of them.

The prosecution sought to introduce petitioner's spontaneous statements as a false explanation tending to prove consciousness of guilt at the time of her arrest. As such, the evidence was plainly admissible

in the government's direct case. *Wilson* v. *United States*, 162 U.S. 613, 620-621; *United States* v. *Sutherland*, 463 F. 2d 641, 646-647 (C.A. 5), certiorari denied, 409 U.S. 1078; *United States* v. *Wilkins*, 385 F. 2d 465, 472 (C.A. 4), certiorari denied, 390 U.S. 951; II Wigmore, *Evidence* § 278, p. 42 (1972 Supp., 3d ed.). It is immaterial that the evidence was not offered until rebuttal, when it also served to impeach petitioner's credibility, since the defense had been fully apprised of the nature and existence of the statements before petitioner took the stand (See Tr. 254-255).[3] *United States* v. *Kilpatrick*, 458 F. 2d 864, 867 (C.A. 7); see also *United States* v. *Tropiano*, 418 F. 2d 1069, 1081 (C.A. 2), certiorari denied, 397 U.S. 1021.

Nor was there any *Miranda* violation, since the statements were spontaneous and not made during a custodial interrogation. Nothing in the record (including petitioner's testimony) suggests that she was questioned at the time of her arrest. Contrary to petitioner's contention, *Miranda* does not require that a suspect be warned of his rights at the moment he is taken into custody, but only that he not be interro-

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[3] The instant case is different from *United States* v. *Padrone*, 406 F. 2d 560 (C.A. 2), both for this reason and because *Padrone* involved the negligent failure of the government to comply with a specific pre-trial order to turn over a statement made by the defendant. The issue of production of a defendant's statement in the possession of the prosecution is governed by Rule 16, Fed. R. Crim. P., which petitioner does not claim was violated here.

gated until he has been advised of his rights and has freely waived them.

> The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. * * * Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [the *Miranda*] holding * * *. [*Miranda* v. *Arizona*, *supra*, 384 U.S. at 478.]

See *United States* v. *Augello*, 452 F. 2d 1135, 1141 (C.A. 2), certiorari denied, 406 U.S. 922.[4]

2. Petitioner contends that certain of the court's instructions to the jury were prejudicial and deprived her of a fair trial. This contention is without merit.

a. Petitioner contends (Pet. 94-98) that the following instruction regarding her interest in the verdict was error (Tr. 530-531):

> A witness who is interested in the outcome of the case is not necessarily unworthy of belief. There is a factor or a possible motive, however, which you may consider in determining the weight and credibility to be given to his or her testimony.

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[4] Petitioner also asserts that the government conceded that the statements allegedly made by petitioner were a recent fabrication by the arresting officer. This theory is based upon an uncompleted sentence by the prosecutor which was interrupted by the court. In context of the discussion, however, there can be no doubt that the prosecutor considered the "fabricator," if any, to be petitioner herself and not the officer who reported the statement (Tr. 253-265).

Instructing the jury that the defendant had the greatest interest in the outcome of the trial, the district judge concluded, "This, like all other issues of fact in the case, is solely for your determination" (Tr. 531).

It is entirely proper for the court to charge the jury that a defendant has a particularly great interest in the outcome of his case, a fact undoubtedly known to the jury even in the absence of a specific instruction. See *Reagan* v. *United States*, 157 U.S. 301, 304-306; *United States* v. *Jacobo-Gil*, 474 F. 2d 1213, 1215-1216 (C.A. 9); *United States* v. *Hill*, 470 F. 2d 361, 363-365 (C.A. D.C.); *Nelson* v. *United States*, 415 F. 2d 483, 487 (C.A. 5).[5] In the instant case, the jury was carefully and properly instructed that they *might* consider that fact in determining the weight to be accorded to petitioner's testimony, but that they need not do so unless they believed that her interest affected her credibility.

b. Petitioner asserts (Pet. 98-100) that character evidence should be considered separately from other forms of evidence and that the jury should have been

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[5] *Taylor* v. *United States*, 390 F. 2d 278 (C.A. 8), certiorari denied, 393 U.S. 869, and *United States* v. *Mahler*, 363 F. 2d 673 (C.A. 2), lend no support to petitioner's position. In each case, an instruction even stronger than that employed here was upheld on the basis of *Reagan* and other precedents. It seems settled that an instruction regarding the defendant's special interest is improper only where it tends to mislead the jury. See *United States* v. *Reid*, 410 F. 2d 1223, 1227-1228 (C.A. 7); cf. *United States* v. *Williams*, 447 F. 2d 894, 902 (C.A. 5).

so instructed. At trial, petitioner asked only that the jury be told character evidence "could be utilized by the jury in raising a reasonable doubt" (Tr. 426). The court charged that evidence of reputation "tends to show" the character of the defendant, that the defendant's character was a question of fact, and that character evidence should be considered with other evidence and given such weight as the jury saw fit. The court stated (Tr. 532-533):

> If you find that the defendant's character for honesty and truthfulness is good, this is a fact that you should consider tending to show that she would not be likely to commit the offense charged against her here.

The jury was also told that if they had a reasonable doubt based on all of the evidence, including the character evidence, they should acquit the petitioner, but if they believed the defendant guilty beyond a reasonable doubt, they should convict her "notwithstanding that the evidence may also satisfy you that she always had a good reputation for honesty and truthfulness" (Tr. 533).

This instruction was completely fair and comported with the charge petitioner requested at trial. The charge which petitioner now advocates, that character evidence standing alone is sufficient basis for acquittal, is confusing and improper except in special circumstances, such as when the defendant presents only character evidence in his defense. *Oertle* v. *United States*, 370 F. 2d 719, 726-727 (C.A. 10), certiorari denied, 387 U.S. 943; see *United States* v.

Fayette, 388 F. 2d 728 (C.A. 2). Petitioner offered at trial her own testimony denying commission of the offense as well as character evidence.

c. Petitioner contends (Pet. 101-104) that the court's charge regarding the failure of either party to call Paulo Romero to the stand was erroneous. After advising the jury that the entire burden of proof falls upon the government and that a defendant is not obligated to produce any evidence (Tr. 531-532), the court instructed that the government was not obliged to produce Romero if his testimony would be merely cumulative, adding, "[n]o adverse inference can be drawn against any party for the failure to call a witness who is equally available to both sides. And I charge you that Mr. Romero was equally available during this trial to the government as well as to each of the defendants" (Tr. 533-534).

The charge was proper. The jury was already aware that petitioner had no duty to produce any witness, and the court's instruction merely cautioned the jury against faulting *either* party for the absence of Romero, whose name figured prominently both in the indictment and in trial testimony. Petitioner's counsel conceded that Romero was present in the courthouse and available to be subpoenaed by either party (Tr. 546). Contrary to petitioner's contention, Romero was not more readily available to the government than to the defense simply because he was awaiting sentence on a plea of guilty at the time of trial. *United States* v. *Deutsch*, 451 F. 2d 98, 116-117 (C.A. 2), certiorari denied, 404 U.S.

1019; *Johnson* v. *United States*, 291 F. 2d 150, 155 (C.A. 8), certiorari denied, 368 U.S. 880.

d. Petitioner also contends (Pet. 104-106) that the prosecutor improperly referred to the commercial character of the cocaine involved in the instant case and that the district judge improperly commented on the gravity of the offense charged. Since the evidence at trial showed that petitioner was involved in two large cocaine transactions totaling $8,000, however, the logical inference was that the drugs were sold with the expectation that the purchasers would resell them for profit. Petitioner was thus not prejudiced by the prosecutor's comment that the cocaine was destined for the street (Tr. 500).

The judge advised the jury that they should not hesitate to acquit if they found no violation of law, but that if they found the defendants guilty as charged, they "should not hesitate because of sympathy or any other reason to render a verdict of guilty as clear warning that crimes of this character may not be committed with impunity. The public is entitled to be assured of this" (Tr. 539). This instruction cannot fairly be read as an attempt to prejudice the jury; it was merely a restatement of their duty as citizens and jurors to safeguard the public by returning a just verdict, whether that verdict be an acquittal or a conviction.

3. Petitioner contends that the court erred in failing to turn over to the defense the Immigration and Naturalization Service file on Paulo Romero, which petitioner had subpoenaed pursuant to Rule 17(c),

Fed. R. Crim. P. (Tr. 126-127). The file was produced for the court's *in camera* inspection, but the Immigration and Naturalization Service advised the court that, in its view, the contents of the file should not be made available to any party in the case (Tr. 226). The judge nevertheless expressed willingness to make arrangements "in the interest of justice" for any party stating on the record a particular need for the material to see it. However, in the court's view, the file contained nothing relevant to the instant case (Tr. 227-228). The district judge rejected petitioner's contention that she was entitled to access to the file without a showing of particular need, but stated that he would consider making available any information relating to Romero's credibility or bias if he were called by any party, although he would not permit a "fishing expedition" (Tr. 229-232).

Petitioner is incorrect in asserting that availability of documents pursuant to a subpoena *duces tecum* entitles any party as a matter of right to pretrial discovery of the material. See *United States* v. *Marchisio*, 344 F. 2d 653, 669 (C.A. 2). Rule 17(c) contains no such provision, but states only that the court *may* direct the pretrial production of the subpoenaed documents and *may* permit inspection by the parties. The district judge in the instant case acted within his discretion in denying discovery of the subpoenaed file, especially in view of the position of the Immigration and Naturalization Service that the material should not be disclosed, the court's determination that the file contents had no bearing on the instant case,

and petitioner's failure to show a need for the material. Since neither party chose to call Romero as a witness, petitioner was not prejudiced by the court's action in refusing access to the file.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1974.

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* Petitioner's contention that she was denied effective representation of counsel when the court refused to postpone her trial is without substance. Petitioner's counsel of record was present and ready to go forward on the first day of trial (Tr. 10). It was entirely appropriate for the court to deny an adjournment for the purpose of substituting a trial counsel who had not appeared in the case, who had just commenced a lengthy trial in another case, and whose proposed retention was communicated to the court only a few days before petitioner's trial was scheduled to begin (Tr. 2-10).

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